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September 26, 1991

745 FIFTH AVENUE  
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TELECOPIER: 212/593-3670**BY TELECOPY**Ms. Elaine Levine  
Office of Regional Counsel  
U.S. Environmental Protection  
Agency - Region IV  
345 Courtland Street  
Atlanta, Georgia 30365Mr. Adam Kushner  
Environmental Enforcement Section  
U.S. Department of Justice  
10th & Pennsylvania Avenue, N.W.  
Washington, D.C. 20530Re: Medley Farm Site

Dear Ms. Levine and Mr. Kushner:

I am writing on behalf of the Medley Farm Site Steering Committee with regard to outstanding issues in the negotiations for a Consent Decree and Scope of Work for performance of the Remedial Design/Remedial Action ("RD/RA") at the Medley Farm Site. The Steering Committee has reviewed the language on Technical Impracticability and Contingency Measures proposed by EPA at our meeting on September 19, 1991. Attached to this letter are proposed changes to that language. Our rationale for the changes we have proposed is set forth below. Also included in this letter is a discussion of some of the other outstanding issues and proposals for resolution. We will be prepared to discuss these and other remaining issues in the conference call scheduled for 9:00 a.m. on Friday, September 27, 1991.

**Technical Impracticability/Contingency Measures.**

In the first paragraph of the Contingency Measures provision, the Steering Committee proposes to strike from the second



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line the phrase "EPA determines that" in order to clarify that the Steering Committee would have the right to initiate a petition for waiver or modification of the remediation levels. The language proposed by EPA suggests that the Steering Committee would not be in a position to petition the agency until after EPA determines that the data from quarterly sampling indicates that asymptotic concentrations have been reached.

The Steering Committee proposes to strike the specific items enumerated in the definition of Technical Maximization Measures. The first Technical Maximization Measure specified in EPA's proposed language is modifying the pump and treat system by alternating pumping to eliminate stagnation points, pulse pumping, and installing additional extraction wells. These modifications are certainly ones which might be undertaken for the purposes of technical maximization; however, there are other known measures we might take. In addition, other options currently unknown to EPA and the Steering Committee might also be available with the development of new technology. Given that this language is to be comprehensive and apply long-term, the Steering Committee believes it would be in the interest of all parties not to limit in any way what is meant by Technical Maximization Measures. To include a very short list of methods of modifying a pump and treat system, which does not include all methods known today, might result in such a limitation and/or require the implementation of measures which are not applicable to a future scenario. The Contingency Measures provision requires that any petition on technical impracticability include a description of Technical Maximization Measures employed to attain the Performance Standards; therefore, the Steering Committee will have to undertake adequate Technical Maximization Measures in order for a petition to be successful. These measures may include those specified in the agency's proposed language and/or other measures. The appropriateness of the measures to employ, however, can best be determined at the point at which the asymptotic state is reached.

The second and third Technical Maximization Measures specified in EPA's language are the periodic reevaluation of new technology for groundwater restoration and continued long-term monitoring. While these tasks might be appropriate in considering Alternative Performance Standards, the Steering Committee does not believe these are true Technical Maximization Measures. The concept of Technical Maximization Measures, as we understand it, is to take steps to maximize the performance of the groundwater pump and treat system that will be constructed and operated under this Consent Decree. Evaluation of new technologies and continued long-term monitoring are not measures to refine the system so that it will operate more effectively. In petitioning for Alternative

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Performance Standards, the Steering Committee would be required to evaluate why achievement of the Performance Standards in the ROD is technically impracticable and what additional response actions might be taken at the Site. This requirement necessarily encompasses an evaluation of new technologies for groundwater restoration and whether those would be appropriate for the Site. Continued long-term monitoring of the Site, possibly combined with institutional controls, might be an alternative response action to consider. Again, however, the specific response actions which might be appropriate are better determined at the point at which the asymptotic state is reached.

The Steering Committee proposes to change the 4th item to be included in the petition to require an evaluation of possible additional response actions using the criteria for remedy selection set forth in the National Contingency Plan ("NCP"). Potential additional response actions might include the use of new technologies which would substantially alter the remedy and possibly require a ROD amendment. The agency will have to review the appropriateness of those response actions using all of the criteria set forth in the NCP, not just the technical impracticability criterion. With this analysis in the petition, EPA will have the information necessary to select additional response actions, if appropriate and/or establish Alternative Performance Standards.

Finally, the Steering Committee will not accept the language in EPA's proposal that gives EPA "sole unreviewable discretion" in making determinations under the Contingency Measures provisions. The language proposed by EPA could subject the Steering Committee to arbitrary and capricious decisions without the protections and standards afforded them under the judicial review provisions of CERCLA, the Administrative Procedures Act ("APA"), and the dispute resolution provisions of the Consent Decree. CERCLA, the APA, the dispute resolution provisions, and general principles of administrative law more than adequately protect the agency against any unfounded challenges to its decisions. The only reason for the additional protection the agency seeks in its proposed language is to avoid totally the fundamental checks and balances established by law. The Steering Committee will simply not agree to give up its rights under those laws.

#### Dispute Resolutions/Supplemental Statements of Position

The Steering Committee proposed a change to paragraph 65.a. of the Consent Decree to allow submission of supplemental statements of position for inclusion in the administrative record for a

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dispute resolution. EPA proposed that it have the discretion over whether supplemental statements of position would be included in the administrative record. To resolve this issue, the Steering Committee proposes to add the following sentence at the end of paragraph 65.a.: "Settling defendants may appeal to the Court any decision of EPA to exclude material from the administrative record."

#### Stipulated Penalties

At our meeting on September 19, 1991, it was agreed that the Steering Committee would submit another proposal for the amounts and time periods for stipulated penalties. The Steering Committee proposes the following for the deliverables identified in 69.b. of the Consent Decree:

| <u>Penalty Per<br/>Violation Per Day</u> | <u>Period of<br/>Noncompliance</u> |
|--|------------------------------------|
| \$2,000                                  | 1st-20th Days                      |
| \$3,000                                  | 21st-50th Days                     |
| \$4,000                                  | 51st Day and thereafter            |

For the deliverables specified in paragraph 70.b., the Steering Committee proposes the following:

| <u>Penalty Per<br/>Violation Per Day</u> | <u>Period of<br/>Noncompliance</u> |
|--|------------------------------------|
| \$1,500                                  | 1st-20th Days                      |
| \$2,500                                  | 21st-50th Days                     |
| \$3,500                                  | 51th Day and thereafter            |

The Steering Committee believes these amounts are sufficient to ensure timely and adequate performance.

While the Steering Committee has not had an opportunity to review EPA's September 25th draft of the Consent Decree in full, we did note that the "walk-away" penalty in paragraph 71. remains in the draft. We want to reiterate the position we have made clear in our negotiating sessions thus far: the Steering Committee members will not sign a consent decree that includes a "walk-away" penalty.

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Schedule for Performance of Quarterly Sampling and Remedial Design

The Steering Committee is submitting with this letter a proposed schedule for performance of the quarterly sampling and monitoring, and the remedial design. This schedule has been developed to address issues discussed in our meeting on September 19, 1991. If there is a delay in lodging, the Steering Committee anticipates that it would submit the first set of documents in a shorter time frame.

We look forward to a productive session on September 27.

Sincerely,

Mary Jane Norville

MJN/da

Enclosure

cc: Mr. Ralph Howard  
Mr. David Nichols  
Mr. Steve Webb  
Medley Farm Site Steering Committee

*(all the above sent via telecopy)*

### E. Contingency Measures

If, with respect to the groundwater treatment and extraction system, ~~EPA determines that~~ data from quarterly sampling at individual monitoring wells demonstrates that concentrations of one or more contaminants remain at asymptotic values above the remediation levels specified in Table 2 attached hereto for a period of two years, notwithstanding compliance with the terms of the Consent Decree and this SOW and Technical Maximization Measures (as defined below) by Settling Defendants, the Settling Defendants may petition EPA to waive or modify one or more of the remediation levels specified in Table 2 based upon a demonstration, in accordance with the provisions of Section 121(d)(4)(C) of CERCLA, 42 U.S.C. § 9621(d)(4)(C), that such remediation level(s) is "technically impracticable from an engineering perspective."

"Technical Maximization Measures" shall mean, following implementation of the Remedial Action in compliance with terms of the Consent Decree and the SOW and subject to EPA approval, implementation of measures to maximize the performance of the Remedial Action to attain and meet continuously for five consecutive quarters the Performance Standards, ~~including, but not limited to the following: (1) modifying the pump and treat system by (a) alternating pumping at wells to eliminate stagnation points, (b) pulse pumping to allow aquifer equilibration and to allow absorbed contaminants to partition into groundwater, and (c) installing additional extraction wells to facilitate or accelerate cleanup of the contaminant plume; (2) periodically reevaluating new technology for groundwater restoration; and (3) continuing long-term monitoring.~~

Any petition by the Settling Defendants to EPA to request a determination of technical impracticability shall include at a minimum the following:

1. an identification of each Performance Standard for which a waiver or modification is sought;

2. a justification setting forth the technical basis for the claim that it is technically impracticable from an engineering perspective to attain and meet continuously for ~~Five~~ 5 consecutive quarters each such Performance Standard at the Site, with such justification demonstrating, using data from quarterly sampling at individual monitoring wells for a period of 2 years, that concentrations of indicator chemicals remain at asymptotic values above Performance Standards;

3. a description of all "Technical Maximization Measures" employed to attain and meet continuously for ~~Five~~ 5 consecutive quarters the Performance Standards;

4. ~~an evaluation, using the criteria set forth in Section 300.430(f) of the National Contingency Plan, 40 CFR 300, a description of any additional response actions that might taken or~~ Part

~~to be taken by the Settling Defendants to assure that the Remedial Action is using the best available technology to reduce the concentrations of contaminants identified in Table 2 attached hereto, to the lowest concentrations that are technically practicable from an engineering perspective.~~

5. a proposed new or revised performance standard, hereinafter referred to as an "Alternative Performance Standard," which shall reflect the lowest concentration of such contaminant identified in Table 2 attached hereto that is technically practicable from an engineering perspective to attain at the Site; and

6. a demonstration that the groundwater portion of the Remedial Action at the Site, together with any additional response actions proposed by the Settling Defendants in its petition, will meet the Alternative Performance Standards and will attain a degree of cleanup of the contaminants identified in Table 2 attached hereto, and of control of further releases which will assure protection of human health and the environment.

Based on a review of the petition and any supporting information submitted by the Settling Defendants, EPA, ~~in its sole unreviewable discretion,~~ shall determine whether the Settling Defendants are to make any modification to the groundwater portion of the Remedial Action or implement any additional response actions relating to groundwater contamination, and whether to waive compliance with or modify any Performance Standards for groundwater. If EPA grants any petition or other relief pursuant to this section, the Settling Defendants shall thereafter implement those modifications to the groundwater portion of the Remedial Action or additional response actions relating to groundwater contamination, and achieve and maintain all new or revised Alternative Performance Standards established pursuant to this section and such Alternative Performance Standards shall be incorporated into the term "Performance Standards" as defined in the Consent Decree for all purposes for which such term is used in the Consent Decree and in this SOW.

~~EPA's decisions and findings with respect to any petition under this section are unreviewable and are not subject to the dispute resolution provisions of the Consent Decree.~~

Proposed language change in the Consent Decree:

Page 9 of most recent (3rd) draft, definition of Performance Standards should be changed to read as follows:

"Performance Standards" shall mean those cleanup standards, standards of control, and other substantive requirements, criteria or limitations set forth in the ROD and the SOW and the tables attached thereto, all of which are incorporated herein by reference, and any Alternative Performance Standards established by ~~and in the sole discretion of EPA~~ pursuant to Paragraph E (Contingency Measures) of the Remedy Components portion of the Overview of the Remedy Section of the SOW.



MEDLEY FARM SITE  
SCHEDULE

- 1) Within 45 days of lodging of the Consent Decree, the Settling Defendants shall provide EPA with \_\_\_\_\_ copies of the following project documents:
  - Field Sampling and Analysis Work Plan
  - Treatability Work Plan
  - Health & Safety Work Plan
- 2) Within 120 days of receipt of EPA's written approval of the project documents (see above), the Settling Defendants shall provide EPA with \_\_\_\_\_ copies of the Technical Memoranda describing the results of the field work, treatability studies, and other technical issues necessary for initiation of the RD Work Plan.
- 3) Within 60 days of receipt of EPA's written approval of the aforementioned Technical Memoranda, the Settling Defendants shall provide the EPA with \_\_\_\_\_ copies of the RD Work Plan for review and approval by the Agency.